Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

KEVIN MCKEOWN

Petitioner,

vs.

THE DELAWARE BRIDGE AUTHORITY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Kevin McKeown
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Pro Se Petitioner

4PP

QUESTIONS PRESENTED

1. Whether toll booths violate the Clean Air Act when they slow and otherwise impede the movement of toxic tail pipe emitting vehicles which *unnecessarily adds to* environmental pollutants?

2. Whether, in light of Whitman, EPA, et al. v. American Trucking Association, 531 U.S. 457, 121 S. Ct. 903 (decided February 27, 2001) which affirmed a Court of Appeals finding that §109(b) of the Clean Air Act unambiguously bars cost considerations, applies to the operation of toll booths?

3. Whether operators of toll booths violate the civil rights of toll payers by requiring an *unnecessary increase* in the period of time a toxic tail pipe emitting vehicle is operated which needlessly increases vehicular pollutants to the environment?

PARTIES TO THE PROCEEDING

The parties to the proceeding not noted in the case caption are:

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Robert Boyle, Executive Director;

THE NEW YORK STATE THRUWAY AUTHORITY,
John R. Platt, Executive Director;

THE METROPOLITAN TRANSPORTATION AUTHORITY,
E. Virgil Conway, Chairman;

THE NEW JERSEY TURNPIKE AUTHORITY,
James Weinstein, Commissioner,
Frank X. McDermott, Chairman;

THE GARDEN STATE PARKWAY AUTHORITY,
Joseph E. Buckelew, Chairman

THE DELAWARE TRANSPORTATION AUTHORITY, Nathan Hayward, III, Secretary.

The Petitioner has no parent or subsidiary companies.

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I. The decision of the Court of Appeals conflicts with the intent of Congress and provisions of the Clean Air Act. Toll booths violate the Clean Air Act when they slow and otherwise impede the movement of toxic tail pipe emitting vehicles which *unnecessarily adds to* environmental pollutants. Recent environmental

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studies, along with *Amicus Curiae* briefs, will be presented to this Honorable Court for consideration.

II. This case offers this Honorable Court the Opportunity to revisit Whitman, EPA, et al. v. American Trucking Association, 531 U.S. 457, 121 S. Ct. 903 (decided February 27, 2001) which affirmed a Court of Appeals finding that §109(b) of the Clean Air Act unambiguously bars cost considerations, and its pertinent application to the operation of toll booths.

III. This case presents important questions which impacts the health, welfare and civil rights of every citizen of the United States, and is not limited to only the states in which toll booths operate. Operators of toll booths not only violate the civil rights of toll payers by requiring an *unnecessary increase* in the period of time a toxic tail pipe emitting vehicle is operated, needlessly increases vehicular pollutants to the environment, such polluting extends beyond state boundaries in the nation's ambient air.

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TABLE OF CITED AUTHORITIES

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Clean Air Act ("CAA")

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APPENDIX A:

SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED AND FILED DECEMBER 21, 2001 (No. 01-7487)

APPENDIX B:

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED, SO ORDERED AND FILED MARCH 29, 2001 (No. 00-0714)

Petitioner Kevin McKeown respectfully requests for a writ of certiorari to be issued to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is unreported and is attached hereto as Appendix A. The Opinion of the District Court granting dismissal of Petitioner's Amended Complaint is unreported and is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (Appendix A) was entered on December 21, 2001. This Honorable Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Clean Air Act. .

STATEMENT OF THE CASE

This is an appeal from an order of Second Circuit Court of Appeals affirming that of the United States District Court for the Southern District of New York, dismissing the Amended Complaint of Appellants, Kevin McKeown and No More Tolls.

In particular, the district court declined to name the Environmental Protection Agency as a necessary party to the action, either as a defendant or as a party-plaintiff, ex. rel.

The lower court granted summary judgment when significant triable issues of fact existed, most notably the violations of the Clean Air Act ("CAA").

Further, the district court found that "motor vehicles are the sources of the pollutants complained of..." (Appendix B) when pleadings clearly presented the **increase of additional pollutants, caused by the existence of toll booths**, as the issue complained of in the Amended Complaint. The district court stated that "drivers would still experience backups" (Appendix B) while the issue clearly presented was the ***unnecessary increase*** in toxic tailpipe emissions.

In 1970, the United States Congress adopted the first major Clean Air Act ("CAA") and established the United States Environmental Protection Agency ("EPA"). Congress specifically empowered the EPA with broad responsibilities for regulating motor vehicle pollution.

In 1990, Congress amended the Clean Air Act to require further reductions in hydrocarbons (HC), CO, NOX and particulate emissions. Congress specifically addressed the need to further reduce the pollution from motor vehicles by setting additional tailpipe standards.

It is estimated that 87% of cancer-causing benzene in the air comes from vehicles. An August, 1994 EPA fact sheet indicates that, "... the personal automobile is the single greatest polluter, as emissions from millions of vehicles on

the road add up. Driving a private car is probably a typical citizen's most 'polluting' daily activity."

In December of 1998, the EPA's office of Air and Radiation advised that "[p]eople exposed to toxic air pollutants at sufficient concentrations and for sufficient durations have an increased chance of getting cancer or experiencing other serious health effect."

Toll booth operators illegally slow and otherwise impede vehicular movement which unnecessarily increases toxic tail pipe emissions and creates an imminent and substantial endangerment to health and the environment in violation of the CAA.

CAA, Section 111, requires a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best technological system of emission reduction.

CAA, Section 1311, requires the "best practicable control technology available." Toll booth operators further violate Section 112 by not ***reducing*** emissions of hazardous air pollutants.

Toll booth operators are seriously violating provisions of the CAA, unnecessarily adding to the polluting of the environment and needlessly contributing to health hazards.

Toll booth operators cause needless delays to vehicles, drivers, occupants and the economic community. Any driver delayed only ten (10) minutes each workday is deprived of forty (40) hours per annum. *(Assumption: 5*

minute delay per one way travel; 5 day work week; 48 week work year). Although the economic damage to the Federal, State and local governments, as well as businesses and individual workers, caused by the existence of toll booths and the actions of toll booth operators can easily be calculated in the billions of dollars, the main focus of this petition is the environmental damage and violation of the CAA.

Additional issues of national importance raised in the Amended Complaint, but not the main focus of the instant petition, include toll booth operators reckless and negligent violation of Federal and State highway safety laws by interrupting the normal flow of vehicular movement by widening and narrowing the areas in which vehicles travel. Roadway approach areas adjacent to toll booths greatly increase the number of lanes existent prior to the toll booth approach area in unlawful multiples causing unsafe roadway conditions.

If not for the existence of toll booths, additional hazardous air pollutants would not be produced.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals conflicts with the intent of Congress and provisions of the Clean Air Act. Toll booths violate the Clean Air Act when they slow and otherwise impede the movement of toxic tail pipe emitting vehicles

which *unnecessarily adds to* environmental pollutants. **Recent environmental studies, along with *Amicus Curiae* briefs, will be presented to this Honorable Court for consideration.**

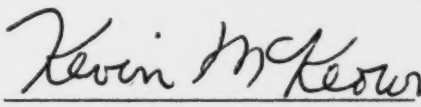
II. This case offers this Honorable Court the Opportunity to revisit Whitman, EPA, et al. v. American Trucking Association, 531 U.S. 457, 121 S. Ct. 903 (decided February 27, 2001) which affirmed a Court of Appeals finding that §109(b) of the Clean Air Act ***unambiguously*** bars cost considerations, and its pertinent application to the operation of toll booths.

III. This case presents important questions which impacts the health, welfare and civil rights of every citizen of the United States, and is not limited to only the states in which toll booths operate. Operators of toll booths not only violate the civil rights of toll payers by requiring an *unnecessary increase* in the period of time a toxic tail pipe emitting vehicle is operated, and needlessly increasing vehicular pollutants to the environment, but nationally since such polluting extends beyond state boundaries in the ambient air.

CONCLUSION

Accordingly, Petitioner respectfully prays that this Honorable Court grant the petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A -- SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED AND FILED DECEMBER 21, 2001

No. 01-7487

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUESTENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of December two thousand one.

Present:
HONORABLE AMALYA L. KEARSE,
HONORABLE RALPH K. WINTER,
HONORABLE GUIDO CALABRESI, Circuit Judges

KEVIN MCKEOWN, NO MORE TOLLS,

Plaintiff-Appellant.,

- v. -

THE DELAWARE BRIDGE AUTHORITY,

Defendant,

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, Robert Boyle, Executive Director, THE NEW YORK STATE THRUWAY AUTHORITY, John R. Platt, Executive Director, THE METROPOLITAN TRANSPORTATION AUTHORITY, E. Virgil Conway, Chairman, THE NEW JERSEY TURNPIKE AUTHORITY, James Weinstein, Commissioner, Frank X. McDermott, Chairman, THE GARDEN STATE PARKWAY AUTHORITY, John D. Porcari, Chairman, THE DELAWARE TRANSPORTATION AUTHORITY, Nathan Hayward, III, Secretary,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York
No. 00-714

William H. Pauley, III, United States District Judge

Appendix A-2

Appearing for Appellant:	Kevin McKeown, pro se, Washington, D.C.
Appearing for Appellees Port Authority and Boyle:	Milton H. Pachter, N.Y., N.Y.
Appearing for Appellees New York State Thruway Authority and Platt:	Norman Spiegel, Ass't Att'y Gen., N.Y., N.Y.
Appearing for Appellees Metropolitan Transportation Authority and Conway:	Anthony P. Semancik, N.Y., N.Y.
Appearing for Appellees New Jersey Turnpike Authority, Weinstein and McDermott:	Stuart M. Lederman, Riker, Danzig, Scherer, Hyland & Perretti, Morristown, N.J.
Appearing for Appellees Maryland Transportation Authority and Porcari:	Deborah A. Donohue, Ass't Att'y Gen., Baltimore, Md.

Appearing for Appellees
Delaware Transportation
Authority and Hayward: Frederick H. Schranck, Dep'y
Att'y Gen., Dover, Del.,

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the record from the United States District Court for the Southern District of New York, and was submitted by plaintiff pro se and by counsel for defendants.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Pauley's Memorandum and Order dated March 29, 2001.

We have considered all of plaintiff's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE,
Clerk
By: /s

APPENDIX B -- MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED, SO ORDERED AND FILED MARCH 29, 2001

No. 00-0714

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ex rel., KEVIN MCKEOWN and NO MORE TOLLS,

Plaintiffs,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ROBERT BOYLE, EXECUTIVE DIRECTOR; THE NEW YORK STATE THRUWAY AUTHORITY, JOHN R. PLATT, EXECUTIVE DIRECTOR; THE METROPOLITAN TRANSPORTATION AUTHORITY, E. VIRGIL CONWAY, CHAIRMAN; THE NEW JERSEY TURNPIKE AUTHORITY, JAMES WEINSTEIN, COMMISSIONER; FRANK X. MCDERMOTT, CHAIRMAN; THE GARDEN STATE PARKWAY AUTHORITY, JOSEPH E. BUCKELEW, CHAIRMAN;

THE MARYLAND TRANSPORTATION AUTHORITY, JOHN D. PORCARI, SECRETARY; THE DELAWARE RIVER AND BAY AUTHORITY, MICHAEL HARKINS, EXECUTIVE DIRECTOR; THE DELAWARE TRANSPORTATION AUTHORITY, and ANNE P. CANBY, SECRETARY,

Defendants.

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs Kevin McKeown ("McKeown") and his organization No More Tolls (collectively "plaintiffs") commenced this pro se citizen's suit against defendants, state authorities and officials responsible for operating toll roads, bridges and tunnels in New York, New Jersey, Delaware and Maryland, alleging that they operate and maintain toll booth facilities in violation of the Clean Air Act, 42 U.S.C. § 7401, et seq. ("CAA"), the Clean Water Act, 33 U.S.C. § 1251, et seq. ("CWA"), the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. ("RCRA"), Occupational Safety and Health Administration ("OSHA") regulations, Federal Highway Administration regulations, nuisance law, and civil rights law.

Currently before this Court are defendants' motions to strike the Environmental Protection Agency ("EPA") and its Administrator Carol Browner from the amended complaint, and to dismiss the amended complaint for lack of subject matter jurisdiction, lack of personal jurisdiction over the non-New York defendants, improper venue and failure to sate a claim. Defendants also argue that the Court should decline to exercise its jurisdiction over the pendent state claims. For the following reasons, defendants' motions are granted.

Background

Plaintiff No More Tolls is a public interest organization in Washington, D.C. (Am. Compl. ¶ 9.) It is "dedicated to the protection and enhancement of the environment of the United States . . . . [I] supports effective enforcement of Federal and State CAA, CWA, RCRA, and other Federal and State laws." (Am. Compl. ¶ 8.) Plaintiff McKeown is the Executive Director of No More Tolls. (Am. Compl. ¶ 9.) The only information revealed about McKeown in the amended complaint is that he "has traveled defendant[s'] operated roadways in excess of twenty years and has sustained damages as a result of the operation of toll booths as described in [the] [amended] complaint." (Am. Compl. ¶ 10.)

Defendants are state authorities and their directors

who are responsible for the administration of public transportation including the operation of toll booths in New York (the "New York defendants"), New Jersey (the "new Jersey defendants"), Delaware (the "Delaware defendants") and Maryland (the Maryland defendants"). (Am. Compl. ¶¶ 8-28)

On November 29, 1999, plaintiffs sent defendants a Notice of Intent to Sue. The Notice of Intent to Sue states that plaintiffs believe defendants are violating the CAA, CWA and RCRA by operating toll booths.

On February 3, 2000, plaintiffs filed this action by order to show cause, requesting a temporary restraining order and a preliminary injunction. Plaintiffs assert claims under the CAA, CWA, RCRA, 'federal common law" nuisance, negligence and civil rights laws, and state law against defendants claiming that: (1) toll booth operators illegally slow and otherwise impede vehicular movement which unnecessarily increases toxic tailpipe emissions endangering "health and the environment"; (2) toll booth areas are "point sources" under the CWA and "cause the diminution of water quality of the surface and subterranean waters and wetland areas"; (3) toll booth operators violate the prohibition against the operation of an open dump, and "continue unpermitted discharge of pollutants into navigatable waters"; (4) toll booth operators violate "an effluent standard or limitation" by permitting discharges of leachate from toll

booth locations; (5) toll booth and related operations fail to use the best practicable control technology available to reduce emissions; (6) toll booth operators are "major sources" of hazardous air pollutants causing adverse environmental effects to wildlife and aquatic life; (7) toll booth operators are "generators" of hazardous waste and violate hazardous waste standards by releasing pollutants and other substances into the air, soil, surface and ground waters in areas adjacent to the toll booths; (8) toll booth operators violate the CWA and CAA by operating without permits; and (9) toll booth operators knowingly and negligently release hazardous air pollutants into the ambient air. (Am. Comp. ¶¶ 42-56.)

Initially, plaintiffs requested that this Court enjoin defendants during the pendency of this action from "slowing or otherwise impeding the movement of vehicles to collect tolls or any other activity that pollutes the air, water or soil of the United Sates." On February 8, 2000, this Court held a hearing and denied plaintiffs' motion.

On February 24, 2000, plaintiffs filed an amended complaint adding the United States Environmental Protection Agency ("EPA") and EPA Administrator Carol M. Browner as plaintiffs, and the Delaware River and Bay Authority and its executive director Michael Harkins as additional defendants. In all other respects, the amended complaint is identical to the initial complaint. However,

plaintiffs did not serve the amended complaint until mid-March, after defendants had filed their motions to dismiss the initial complaint. (Semancik Decl. Supp. Mot. To Strike Browner & EPA from Am. Compl. ¶ 3.)

On March 9, 2000, this Court issued an order denying plaintiffs' motion for preliminary injunctive relief and a temporary restraining order. On July 13, 2000, this Court denied plaintiffs' motion for reconsideration.

Discussion

I. Motion to Strike EPA and Carol Browner from the Amended Complaint

Defendants argue that the EPA and Browner should be stricken from the amended complaint because they did not sign the amended complaint, McKeown and No More Tolls have no authority to act on behalf of the EPA or its administrator, and the EPA is not a necessary party.

The CAA, CWA and RCRA all permit a citizen to bring a civil action to enforce those statutes on their own behalf. See 33 U.S.C. § 1365(a) ("any citizen may commence a civil action on his own behalf [under this section] ..."; 42 U.S.C. § 6972(a) ("any person may commence a civil action on his own behalf [under this section] . . ."); 42 U.S.C. § 7604 (same). None of those

statutes authorizes a citizen to bring an action to enforce the CAA, CWA or RCRA on behalf of the EPA or its Administrator. Moreover, McKeown and No More Tolls have not offered any reason why the EPA and Browner are necessary parties. See, e.g., Friends of the Earth v. Carey, 535 F.2d 165, 173 (2d Cir. 1976) (noting that the CAA "simply obligates the citizen plaintiff to provide the EPA with notice of the . . .violation and of the upcoming private enforcement suit . . . . The agency can the decide for itself whether or not to participate in the proceedings."); Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809, 814-15 (D.C. Cir. 1975) ("The [CAA} citizen suit provision contemplates actions against the Administrator where he fails to perform a non-discretionary act. Alternatively, the citizen, after giving sixty days notice to the Administrator, can proceed directly against the violator. When the plaintiff elects this later course, the Administrator has the right to intervene in the suit, but he is not required to be a participant in such litigation and his absence does not render the action infirm.")

Accordingly, defendants' motions to strike the EPA and Browner from the amended complaint are granted. Further, because defendants moved to dismiss the initial complaint before they were served with the amended complaint, and because the amended complaint does not materially differ from the initial complaint, defendants' motions to dismiss the initial complaint are deemed motions to dismiss the amended complaint.

Plaintiffs also substituted the Delaware River and Bay Authority and its Executive Director Michael Harkins for the Delaware Bridge Authority. It is not clear whether those defendants were served with the amended complaint. They have not answered or moved to dismiss it. However, since the amended complaint is dismissed for lack of standing and failure to state a claim, it is immaterial whether they were served with the amended complaint.

II. Motion to Dismiss Standards

On a Rule 12 motion to dismiss, the Court generally must accept the factual allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 113 S.Ct. 1160, 1161 (1993) (noting that factual allegations in the complaint must be accepted as true on motion to dismiss); Press v. Quick & Reilly, Inc., 218 F.3d 121, 128 (2d Cir. 2000) (same). In order to survive dismissal, a plaintiff must assert a cognizable claim and allege facts that, if true, would support such a claim. See Boddie v. Schnieder, 105 F.3d 857, 860 (2d Cir. 1997). A pro se litigant's complaint, "however inartfully pleaded,"

must be held to a "less stringent standard[] than formal pleadings drafted by lawyers . . . ." Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596 (1972).

On a Rule 12(b)(1) motion challenging the district court's subject matter jurisdiction, the Court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits, and if necessary, hold an evidentiary hearing. See Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000). However, when matters outside the pleadings are presented on a motion to dismiss for failure to sate a claim under Rule 12(b)(6), generally the district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment and afford all parties the opportunity to present supporting material. See Morelli v. Cedel, 141 F.3d 39, 46 (2d Cir. 1998) (citing Carter v. Stanton, 405 U.S. 669, 671, 92 S. Ct. 1232, 1234 (1972)).

On a 12 (b) (2) motion the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant. See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriquez, 171 F.3d 779, 784 (2d Cir. 1999) ; Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir. 1999) (citing Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996)). Since the parties have not conducted discovery, the plaintiff need persuade the court

only that its factual allegations constitute a prima facie showing of jurisdiction over the defendants. See Kernan 175 F.3d at 240; Jazini v. Nissan Motor Co., 148 F.3d 181, 184 (2d Cir. 1998). The plaintiff's prima facie showing may be established solely by pleading, in good faith, legally sufficient allegations of jurisdiction. See Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990). The pleadings and any affidavits are construed in the light most favorable to the plaintiff and all doubts are resolved in its favor. A.I. Trade Finance, Inc. v. Petra Bank, 989 F.2d 76, 79-80 (2d Cir. 1993).

Similarly, on a Rule 12 (b) (3) motion to dismiss based on improper venue, the burden of showing that venue in the forum district is proper falls on the plaintiff. See, e.g., Blass v. Captial Int'l Security Group, No. 99-CV-5738 (FB), 2001 WL 301137, at *2 (E.D.N.Y. Mar. 23, 2001). In a case involving multiple claims, the plaintiff must show that venue is proper for each claim asserted, but dismissal of an improperly venued claim is not warranted if it is factually related to a properly venued claim and the claims could be considered "one cause of action with two grounds of relief." 17 James Wm. Moore et al., Moore's Federal Practice § 110.05 (3d ed. 1997). The court must take all allegations in the complaint as true, unless contradicted by the defendants' affidavits. See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1352 (1990 & Supp. 1999). When an allegation is so challenged "[a] court

may examine facts outside the complaint to determine whether venue is proper. The court must draw all reasonable inferences and resolve all factual conflicts in favor or the plaintiff." Id. (citations omitted). If the defendants prevail on their Rule 12 (b) (3) motion, the court has the power to dismiss or transfer the case to any district in which it could have been brought. See 28 U.S.C. § 1406(a); see also Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993) (holding that "[w]hether dismissal or transfer is appropriate lies within the sound discretion of the district court").

III. Standing

Defendants argue that the complaint should be dismissed for lack of standing because plaintiffs have not alleged an injury in-fact, or alternatively, that any alleged injury is not redressable by this action. (See, e.g., New York State Thruway Auth.'s Br. At 4-5; New Jersey Defs. Br. At 5-13.)

An organization such as No More Tolls may have standing to "seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association my assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties." Warth v.

Seldin, 422 U.S. 490, 511 95 S. Ct. 2197, 2211 (1975) (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 458-60, 78 S. Ct. 1163, 1169-171 (1958); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 183-87, 71 S. Ct. 624, 654-57 (1951) (Jackson J., concurring)). No More Tolls, however, has not asserted injury to itself.

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. See Warth, 422 U.S. at 511, 95 S. Ct. at 2211. To have standing as the representative of its members, No More Tolls must satisfy the constitutional requirement of a case or controversy. See Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361 (1972). The only know member of No More Tolls Is McKeown. Thus, plaintiffs must establish that: (1) McKeown has suffered an "injury in fact: - "an invasion of a legally protected interest which is concrete and particularized" and "actual or imminent, not 'conjectural' or hypothetical'"; (2) "there is a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the[e] result [of] the independent action of some third party not before the court"; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992); accord, e.g., Warth, 422 U.S. at 511. 95 S. Ct. at 2211-12; Sierra Club, 405 U.S. at 734-41, 92 S. Ct.

at 1365-69.

The only personalized injuries alleged in the amended complaint are that McKeown "has sustained damages as a result of the operation of toll booths" (Am. Compl. ¶ 10) and that "[d]efendant[s'] operation of toll booths damage the business, property and health of the [p]laintiff" in violation of antitrust laws (Am. Comp. ¶ 83). Neither of those allegations is concrete or particularized, nor do they constitute a "distinct and palpable injury." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100, 99 S. Ct. 1601, 1608 (1979); Sierra Club v. SCM Corp., 747 F.2d 99, 103 (2d Cir. 1984). Additionally, there are no facts alleged that support an antitrust claim.

Moreover, plaintiffs' allegations that the toll booths have a negative impact on the environment are based on the premise that toll booth increase motor vehicle toxic tailpipe emissions. (Am. Compl. ¶ 29-41) Even if the operation of toll booths increases toxic tailpipe emissions, the emissions are caused by the vehicles owned by millions of people not parties to this action. If all toll booths were removed from the mid-Atlantic states, as plaintiffs seek, millions of drivers would still experience backups, traffic jams and delays that increase tailpipe emissions. Accordingly, plaintiffs have not established that the injury complained of is "fairly . . . traceable to the challenged action of defendant [s], and not ... the result [of] the independent action of some third party

not before the court." Lujan, 504 U.S. at 560, 112 S. Ct. at 2136. Nor have they demonstrated that the elimination of toll booths would redress injuries to plaintiffs.

Further, even if plaintiffs could establish that they have standing to sue, they failed to comply with the mandatory notice requirement with respect to the Maryland and New Jersey defendants.

The Delaware defendants also argue that the suit is barred by the Eleventh Amendment (see Delaware Defs.' bare-bones argument in their Br. at 5-6). That argument, which is the only argument proffered by those defendants, consists of two paragraphs that states, without any support, that "None of the basic federal environmental laws on which plaintiffs place crucial reliance and which include citizen suits provisions are based on an appropriate Congressional determination to create legislation to enforce the provisions of the Fourteenth Amendment, as permitted by Section 5 of that Amendment. Therefore, these claims are barred." (Delaware Defs.' Br. at 5.) The Delaware defendants' brief is at best an invitation to research their theory and serve generally as an advocate for them. This Court declines the invitation. See, e.g., Ernest Haas Studio, Inc. v. Palm Press, Inc., 164 F.3d 110, 111-12 (2d Cir. 1999)

IV. Notice

The CAA, CWA and RCRA require that 60 days prior to filing a citizen suit, a plaintiff must send notice of the alleged violation to the defendant, the sate where the violation occurred, and to the EPA. See 42 U.S.C. § 7604; 42 U.S.C. § 6972; 33 U.S. C. § 1365.

The Supreme Court has held that compliance with the RCRA notice requirements, which are almost identical to the CAA and CWA notice requirements, is mandatory. See Hallstron v. Tillamook County, 493 U.S. 20, 26, 110 S. Ct. 304, 308-09 (1989) ("compliance with the 60-day notice provision is a mandatory, not optional, condition precedent to suit").

The Maryland Transportation Authority and John D. Porcari aver that plaintiffs did not notify them of their intent to bring suit. (See Porcari Aff. ¶ 6.) Plaintiffs have not offered any evidence to the contrary. Accordingly, plaintiffs' CAA, CWA and RCRA claims against the Maryland Transportation Authority and John D. Porcari are dismissed.

Because plaintiffs did not serve the requisite notice on the Maryland defendants, this Court need not determine whether this Court has personal jurisdiction over them. (See Maryland Defs.' Br. at 3-5.)

The New Jersey defendants do not contest receipt of

plaintiffs' notice of intent to sue. While the other defendants except for the Metropolitan Transportation Authority and E. Virgil Conway proffer similar arguments, one of them included a copy of the notice. The New Jersey defendants state in their brief that the same notice was sent to each defendant, however, that statement is not admissible evidence. Because the Court cannot evaluate the notices sent to the remaining defendants, their motions to dismiss for failure to comply with the notice requirements are denied. They argue that the information contained in the notice did not contain sufficient information.

The CAA requires that Notices to the Administrator, States, and alleged violators regarding violation of an emission standard or limitation or an order issued with respect to an emission standard or limitation, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order which has alleged to be in violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice. 40 C.F.R. § 54.3 (b).

The CWA requires that Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity

alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice. (40 C.F.R. § 135.3(a).

Similarly, the RCRA requires that Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement, or order which has become effective under this Act shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice. (40 C.F.R. § 254.3(a))

As the New Jersey defendants observe, plaintiffs' notice of intent to sue failed to identify virtually every requirement dictated by the CAA, CWA, and RCRA. (See Cernich Aff. Ex. B: Notice of Intent to Sue.) Most importantly, plaintiffs did not identify any emission standards or limitations alleged to have been violated under the CAA, nor did they identify any specific effluent standards defendants allegedly violated under the CWA, or specific permits, standards, regulations, conditions, requirements or orders which defendants allegedly violated

under the RCRA. Accordingly, the New Jersey defendants' motion to dismiss plaintiffs' CAA, CWA and RCRA claims for failure to comply with the mandatory notice provisions pursuant to those statutes is granted. See Hudson Riverkeeper Fund, Inc. v. Putnam Hosp. Ctr., Inc., 891 F. Supp. 152, 154-55 (S.D.N.Y. 1995) (dismissing CWA claim for failure to comply with content requirements specified in 40 C.F.R. § 135.3)

Even if plaintiffs had complied with the notice requirements, venue is improper as to the Maryland, New Jersey and Delaware defendants. Moreover, plaintiffs have failed to state a claim upon which relief can be granted.

V. Venue

The CAA and CWA contain venue provisions that permit a citizen action to be commenced only in the judicial district in which the offending source of the standard or limitation is located. See 42 U.S.C. § 7604(c)(1) ("Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located."); 33 U.S.C. § 1365 (c) (1) ("Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source

is located.") The RCRA venue provision limits the filing of a citizen suit to that jurisdiction where the alleged violation occurred. See 42 U.S.C. § 6972 (a) ("Any action [against any person and any other governmental instrumentality or agency who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter] shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur.")

Plaintiffs allege that the New Jersey defendants operate toll booths in New Jersey (Am. Compl. ¶ ¶ 17-22), that the Maryland defendants operate toll booths in Maryland (Am. Compl. ¶ ¶ 23-24), and that the Delaware defendants operate toll booths in Delaware (Am. Compl. ¶ ¶ 25-28). Plaintiffs do not allege that those defendants operate any toll booths in New York, or that any alleged violations or endangerment arising from any pollutants caused by those defendants occurred or may occur in New York. The Court declines to transfer those claims because plaintiffs have failed to state a claim under the CAA, CWA and RCRA (see infra sections VI – VIII), and grants the motions by the New Jersey, Maryland and Delaware defendants to dismiss the complaint for improper venue.

VI. Clean Air Act Claims

The CAA was implemented to prevent and control air pollution by providing "[f]ederal financial assistance and leadership . . . for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." 42 U.S.C. § 7401 (a) (3), (4). The CAA amendments of 1970 and 1977 required the EPA to promulgate national ambient air quality standards ("NAAQS") for various air pollutants. See 42 U.S.C. § 7409; Wilder v. Thomas, 854 F2d 605, 609 (2d Cir. 1988).

Section 7410 (a) (1) requires that each state adopt an implementation plant ("SIP") that provides for the "implementation, maintenance, and enforcement of national primary and secondary ambient air quality standards." See Wilder, 854 F.2d at 609, Concerned Citizens of Bridesburg v. EPA, 836 F.2d 777, 780-81 (3d Cir. 1987).

The citizen suit provision of the CAA creates "a limited private right of action to enforce the Act's provisions." Specifically, it provides that [A]ny person may commence a civil action on his own behalf – (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this chapter... 42 U.S.C. § 7604 (a) (1) (1995). The Act defines an "emission standard or limitation" as any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery

requirements .. which is in effect under this chapter... or under an applicable implementation plan. 42 U.S.C. § 7604 (f) (3) (1995). "In order to avoid either overburdening the courts or unduly interfering with implementation of the act . . . [C]ongress carefully circumscribed the scope of the [citizen suit] provision by authorizing citizens to bring suit only for violations of specific provisions of the act or specific provisions of an applicable implementation plan." Wilder, 854 F.2d at 613. Thus, to state a claim under the citizen suit provision a plaintiff must allege "a violation of 'a specific strategy or commitment in the SIP and describe, with some particularity, the respects in which compliance with the provision is deficient." Coalition Against Columbus Ctr. V. City of New York, 967 F.2d 764, 769 (2d Cir. 1992). Accord, e.g., Wilder, 854 F.2d at 610; Council of Commuter Orgs. V. Gorsuch, 683 F.2d 648, 670 (2d Cir. 1982).

Plaintiffs claim that defendants have violated the CAA by slowing "vehicular movement which unnecessarily increases toxic tailpipe emissions." However, the complaint does not identify any violations of specific emissions standards, or limitations under the CAA or legally enforceable strategies or commitments that the defendants made under a current SIP.

Plaintiffs also claim that toll booths are major sources of hazardous air pollutants under 42 U.S.C. § § 7411, 7412. The CAA defines a "major source" as a "stationary source"

"that emits or has the potential to emit considering controls in the aggregate 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants . . . ." 42 U.S.C. § 7412 (a)(1). A stationary source is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant," 42 U.S.C. § 7411 (a)(3).

Plaintiffs do not allege that toll booths emit or have the potential to emit air pollutants. See, e.g., Sierra Club v. Larson, 2 F.3d 462, 466-69 (1st Cir. 1993) (ventilation buildings do not generate their own emissions and thus are not stationary sources). They claim that motor vehicles emit the air pollutants. Motor vehicles, however, are specifically excluded from the definition of stationary source. See 42 U.S.C. § 7602 (z) ('The term 'stationary source' means generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes . . . .").

In addition, plaintiffs claim that defendants violate section 7408. (Am. Compl. ¶ ¶ 115, 117.) Plaintiffs cannot state a claim under section 7408 because it imposes obligations on the EPA Administrator, who has not been named as a defendant in this action, and does not adopt any particular emission standard or limitation or refer to a commitment defendants have made under a current SIP.

Accordingly, defendants' motions to dismiss plaintiffs' CAA claims for failure to state a claim are granted.

VII. Clean Water Act Claims

Citizen suits under the CWA are permitted only to enforce "an effluent standard or limitation" or "an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365 (a). Effluent standards and limitations are administratively established regulations of particular types of dischargers on the amounts of pollutants that my be discharged. See 33 U.S.C. § 1362 (11); United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 979 (2d Cir. 1984).

Plaintiffs assert that "[toll booth operators violate 'an effluent standard or limitation' under 33 U.S.C. [§] 1365 (a)(1) (A) because of illegal and unpermitted discharges of leachate from toll booth locations," that "[d]efendants violate CWA Section 311 by continuing to cause the dimunition of water quality of the surface and subterranean waters by release of pollutants into the surface waters and ground waters under and adjacent to toll booth areas," and that defendants fail to use "the best practicable control technology available to achieve their road use fee collection objectives." Plaintiffs' sweeping allegations do not charge defendants with violating any effluent standards or

limitations. See, e.g., Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 394 (5th Cir. 1985) ("Because the complaint . . . does not allege that [defendant] is 'in violation' of an effluent standard, limitation or order, ... [plaintiffs] fail to state allegations sufficient to support jurisdiction in this case."); Hooker Chems. & Plastics, 749 F.2d at 979. Plaintiffs' reference to the "best practicable control technology" concerns a section of the CWA that does not establish any specific effluent limitations and is directed to the EPA, not to defendants. See 33 U.S.C. § 1311 (b) (1) (A).

Plaintiffs also claim that "toll booths are point sources as defined by the EPA and violate CWA Section 301." The CWA defines "point source" as: any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362 (14). The Second has noted that "[a]lthough by its terms the definition of 'point source' is nonexclusive, the words used to define the term and the examples given (pipe, ditch, channel, tunnel, conduit, well, discrete fissure, etc.) evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial

source to navigable waterways." United States v. Plaza Health Labs., Inc., 3 F. 3d 643, 646 (2d Cir. 1993) ; cf., Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs., 917 F. Supp. 251, 257 (S.D.N.Y. 1996) (building through which rainwater enters and passes into a river as runoff is not a "point source" under the CWA). Courts have held that "the touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped." Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 988 (E.D. Wash. 1994) (citing cases). Non-point sources include uncollected runoff water from, for example, oil and gasoline on a highway, or stormwater runoff from highways, construction sites or industrial parks, which are difficult to ascribe to a single polluter. United States v. Earth Sciences, Inc., 599 F.2d 368, 373-74 (10th Cir. 1979); Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1358-59 (D.N.M. 1995); Washington Wilderness Coalition, 870 F. Supp at 988.

Here, motor vehicles are the sources of the pollutants complained of, i.e. toxic tailpipe emissions on toll roads and not toll booths. Further, the sources are not capable of being attributed to a discernible polluter. Moreover, the "leachate" that plaintiffs claim is released from toll booths, including carbon monoxide, nitrogen oxide and sulfur, are air emissions and not water pollutants covered by the CWA. See 42 U.S.C. § 1362 (6) (definition of "pollutant" under the CWA).

Plaintiff's last claim for relief under the CWA alleges that defendants operate without the requisite permits in violation of 33 U.S.C. § 1344. (Am. Compl. ¶¶ 46, 67, 69.) Section 1344 prohibits the discharge of dredged or fill material into navigable waters. Plaintiffs have not identified any navigable water, nor have they alleged that defendants have discharged dredge or fill materials into navigable waters.

For all the above stated reasons, defendants' motions to dismiss plaintiffs' CWA claims are granted.

VIII. Resources Conservation and Recovery Act Claims

The RCRA is "a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." Meghrig v. KFC Western, Inc., 516 U.S. 479, 483, 116 S.Ct. 1251, 1254 (1996); see also Prisco v. A&D Carting Corp., 168 F.3d 593, 608 (2d Cir. 1999). The purpose of the RCRA "is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" Id. (quotations omitted); see also 42 U.S.C. § 6902 (b)). In furtherance of that goal, RCRA contains a provision allowing citizen lawsuits for injunctive relief under either 42 U.S.C. § 6972 (a) (1) (A) or (a) (1) (b). Prisco, 168 F.3d at

608; also 42 U.S.C. § 6972. Plaintiffs' claim for relief under 42 U.S.C. § 6973 (Am Compl. ¶ 77) is therefore dismiss because that section is not subject to citizen suits.

To establish a violation of section 6972 (a) (1) (A), a plaintiff must establish that the defendant is currently in violation of a "permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." 42 U.S.C. § 6972 (a) (1) (A); ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 359 (2d Cir. 1997). In order to establish rights under 42 U.S.C. § 6972 (a) (1) (B) plaintiffs must show that (1) the defendant was or is a generator or transporter of solid or hazardous waste or owner or operator of a solid or hazardous waste treatment, storage or disposal facility; (2) the defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste, as defined by RCRA, 42 U.S.C. §§ 6903 (3), (27); and (3) that the solid or hazardous waste in question may pose an imminent and substantial endangerment to health or the environment 42 U.S.C. § 6972 (a) (1) (B); Prisco, 168 F.3d at 608; ABB Indus. Sys., 120 F.3d at 359.

Plaintiffs have not alleged that defendants are violating a specific "permit, standard, regulation, condition, requirement, prohibition, or order" under the RCRA. Plaintiffs' conclusory allegation that defendants violated

Subchapter III of RCRA (Am Compl. ¶ 75) does not allege a violation of any specific requirement in that subchapter. See ABB Indus. Sys. 120 F. 3d at 359. Plaintiffs also do not allege any facts from which it could be inferred that toll booth operators created solid or hazardous waste, as defined by the RCRA, disposed of it, transported it, or otherwise handled it. See Delaney v. Town of Carmel, 55 F. Supp. 2d 237, 262 (S.D.N.Y. 1999) (dismissing RCRA claims where plaintiffs failed to demonstrate that defendant created, disposed of, transported or handled solid or hazardous waste). Moreover, none of the substances mentioned in the complaint are listed as hazardous waste under EPA regulations. See 40 C.F.R. § 79: "[d]efendants violate the prohibition against the operation of an open dump"). See 42 U.S.C. § 6945 (a).

Accordingly, defendants' motions to dismiss plaintiffs' RCRA claims are granted.

IX. Federal Common Law Claims

Plaintiffs assert a multitude of negligence, nuisance and civil rights claims entitled "federal common law claims." (Am. Compl. ¶¶ 82-105.) Since there is no federal common law, those claims will be treated as alleging violations of federal statutes governing those subject matters.

A. Nuisance Claims

Plaintiffs assert two "nuisance" claims. The first claim alleges that defendants' operation of toll booths "damages the business, property and health of the Plaintiff and citizens of the United States and violate[s] 15 U.S.C. [§] 15." (Am Compl. ¶ 83.) 15 U.S.C. § 15 address recovery for injuries to business or property for antitrust violations. Plaintiffs have not alleged any facts relevant to an antitrust claim. Defendants' motion to dismiss plaintiffs' first "nuisance" claim is therefore granted.

Plaintiffs' also allege that "defendants damage the environment" in violation of 42 U.S.C. § 7408, 33 U.S.C. § 1317, 33 U.S.C. § 1312, 42 U.S.C. § 7619, 42 U.S.C. § 7525, 42 U.S.C. § 7521, 42 U.S.C. § 7430, 42 U.S.C. § 7412 and 42 U.S.C. § 7409. (Am. Compl. ¶ 85.) However, those statutes are only enforceable by the EPA Administrator and are not subject to citizen suits. Defendants' motion to dismiss plaintiffs' second "nuisance" claim is therefore granted.

B. Negligence Claims

Plaintiffs assert two "negligence" claims. First, plaintiffs claim that defendants "negligently caus[e] . . . hazardous substances to be released into the ambient air" in violation of 42 U.S.C. §§ 7521, 9613. (Am. Compl. ¶ 91.) 42 U.S.C. § 7521 grants the EPA Administrator authority to promulgate regulations related to emissions standards for

new motor vehicles or new motor vehicle engines. 42 U.S.C. § 9613 establishes when an interested party may seek review of a regulation promulgated under that chapter. Neither stature is relevant to plaintiffs' claims.

Plaintiffs also allege that defendants negligently damage the waters of the United States by operating toll booths in violation of 33 U.S.C. § 1323. (Am. Comp. ¶ 91.) That stature is part of the Federal Water Pollution Control Act and prescribes regulations for departments, agencies and instrumentalities of the executive, legislative and judicial branches of the federal government. None of the defendants are members of any branch of the federal government.

Accordingly, defendants' motions to dismiss plaintiffs' "negligence" claims are granted.

C. Civil Rights Claims

Plaintiffs allege that defendants violate 42 U.S.C. § 1983 by "forcing toll payers to participate in the defendants['] violations of state and Federal laws and by unnecessarily and unlawfully impeding the movement of citizens thus causing toll payers to unnecessarily pollute the environment." (Am. Comp. ¶ 87.) Even if plaintiffs' section 1983 claim was not preempted by the CAA, CWA and RCRA provisions limiting the scope of citizen suits, see Middlesex County Sewerage Auth. v. National Sea

Clammers Ass'n, 453 U.S. 1, 20-21, 101 S. Ct. 2615, 2626-27 (1981) (finding the remedial devices provided in the Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act sufficiently comprehensive, particularly since they provide for citizen suits, and therefore that Congress intended to preclude the remedy of suits under section 1983), plaintiffs have not alleged that defendants have deprived them of any particular rights, privileges or immunities secured by the Constitution or federal law. Accordingly, defendants' motion to dismiss plaintiffs' section 1983 claim is granted.

X. Occupational Safety and Health Act Claims

Unlike the CAA, CWA and RCRA, the Occupational Safety and Health Act ("OSHA") does not contain a citizen suit provision. Rather, OSHA authorizes the Secretary of Labor to promulgate standards for workplace safety. See 29 U.S.C. §§ 655, 657-59; 29 C.F.R. §§ 1900-2400. The only provision in OSHA that permits a private citizen to bring a suit in federal court to enforce a standard is section 655(f), which allows [a]ny person who may be adversely affected by a standard issued under this section . . . . at any time prior to the sixtieth day after such standard is promulgated [to] file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. (29 U.S.C. § 655 (f).

The complaint does not allege that McKeown or any unnamed members of No More Tolls are employees of defendants who are adversely affected by defendants' violations of a specific OSHA standard, or that they are otherwise within the zone of interest to be protected by OSHA. Moreover, this action was filed in the district court and not the court of appeals. Because plaintiffs do not have standing to bring an OSHA action, defendants' motions to dismiss plaintiffs' OSHA claims are granted.

XI. Federal Aid Highway Act

Plaintiffs claim that defendants violate 23 U.S.C. § 1109 by "interrupting the normal flow of vehicular movement by dangerously widening and narrowing the area in which vehicles travel." (Am Comp. ¶ 113.) There is no statute codified as 23 § 1109. Assuming that plaintiffs intended to cite section 109 of Title 23, plaintiffs still fail to state a claim. Section 109 prohibits the Secretary of Transportation from approving highway projects that do not "adequately meet existing and future traffic needs and conditions in a manner conducive to safety . . . . "

Thus, any claim to compel compliance under section 109 must be brought against the Secretary of Transportation. See Road Review League v. Boyd, 270 F. Supp. 650, 661 (S.D.N.Y. 1967). Since defendants are not a proper party to such a suit, their motions to dismiss plaintiffs' Federal Aid Highway Act claim are granted.

XII. Pendent State law Claims

Plaintiff has alleged numerous claims under various state environmental laws. While the Court may exercise supplemental jurisdiction over the state claims pursuant to 28 U.S.C. § 1367, the Court declines to exercise such discretion because the Court has dismissed plaintiffs' federal claims early in this litigation. See Travelers Ins. Co. v. Keeling, 996 F.2d 1485, 1490 (2d Cir. 1993) (addressing the discretion to exercise jurisdiction over state law claims); see also United Mine Workers of Am. V. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139 (1966). Accordingly, defendants' motions to dismiss plaintiffs' state law claims are granted.

Conclusion

For the reasons set forth above, defendants' motion to strike the Environmental Protection Agency and Carol Browner are granted. Defendants' motions to dismiss the complaint with prejudice are also granted. The Clerk is directed to close this case and to enter judgment in favor of defendants.

Dated: March 29, 2001
New York, N.Y.

SO ORDERED:

s/
WILLIAM H. PAULEY III
U.S.D.J.

(2)

Supreme Court, U.S.
FILED

MAY 14 2002

OFFICE OF THE CLERK

No. 01-1421

In The

Supreme Court of the United States

KEVIN MCKEOWN

Petitioner,

vs.

THE DELAWARE BRIDGE AUTHORITY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF

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24 pg

TABLE OF CITED AUTHORITIES

Cases:

Whitman, EPA, et al. v. American Trucking Association, 531 U.S. 457, 121 S. Ct. 903 (decided February 27, 2001)

Acts of Congress:

Clean Air Act ("CAA")

TABLE OF APPENDICES

APPENDIX A:

STUDY: A MODEL OF THE TOTAL COST OF HIGHWAY TOLL COLLECTION BY PROFESSORS PETERS AND KRAMER

SUPPLEMENTAL BRIEF FOR PETITIONER

The petition demonstrates that lower court findings in this case create a conflict with Whitman, EPA, et al. v. American Trucking Association, 531 U.S. 457, 121 S. Ct. 903 (decided February 27, 2001) and with provisions of the Clean Air Act. Since the filing of this petition, petitioner has been made aware of an important study (Appendix "A") by Professors from The City University of New York and Kutztown University of Pennsylvania which indicates that toll booths ***create*** significant amounts of pollutants in violation of The Clean Air Act.

1. Respondents do not dispute their violations of The Clean Air Act, that a conflict exists that requires this Court's full consideration or that this matter greatly affects the health and welfare of vast amounts of U.S. citizens. Further, respondents consented to Professors' Peters and Kramer request to present this study to this Honorable Court. In short, the importance of the question presented is essentially unchallenged.

2. As this Court observed in Whitman, EPA, et al. v. American Trucking Association, Congress intended to protect the public without cost concerns and expressly provided that the best technology available be utilized.

3. Toll booths violate The Clean Air Act when they slow and otherwise impede the movement of toxic substance emitting vehicles and *unnecessarily add to* environmental pollutants. As in Whitman, EPA, et al which affirmed a Court of Appeals finding that §109(b) of the Clean Air Act ***unambiguously*** bars cost considerations, the current operation of toll booths must stopped.

4. This case presents important questions which impact the health, welfare and civil rights of every citizen of the United States, and is not limited to the states in which toll booths operate.

CONCLUSION

Accordingly, Petitioner respectfully prays that this Honorable Court grant the petition for Writ of Certiorari.

Respectfully submitted,

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A Model of the Total Cost of Highway Toll Collection

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Presented at
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New York, New York

Appendix A-1

Forthcoming in the Proceedings of the 24th Annual Conference of the Association of Pennsylvania University Business and Economic Faculties October 2002.

A Model of the Total Cost of Highway Toll Collection

Introduction

Air quality and greenhouse gas emissions are important issues around the world. Most solutions to air quality issues have some type of negative economic impact such as monitoring costs and/or constraints on economic growth. One potential means of emission control that does not have a negative impact on economic growth is improved toll collection on toll bridges and roads. The traditional manual collection method causes motorists to decelerate from, and reaccelerate to, highway speeds. This, combined with the affects of queuing at toll plazas during peak travel periods, results in significant environmental costs. However, current models of the cost of toll collection do not account for these costs and therefore significantly underestimate the benefits to society of improved toll collection. We propose extending current models to account for these environmental costs.

Literature Review

Prior research on toll collection has focused on the compliance and administrative costs of the collection process. Vickrey (1963) is the first to outline a theory of the optimal pricing of road networks. Arnott, de Palma and Lindsey (1997) extend the Vickrey model by creating a structural model of road congestion that considers congestion technology and behavioral decisions of drivers in determining optimal toll pricing. Sheila and Wilson (1991) consider the idea of optimal tolls and the deadweight loss to society created by traffic delays resulting from the toll collection process.

Friedman and Waldfogel (1995) and Burris and Hildebrand (1996) document some of the major issues related to the administrative and compliance costs of toll collection. In addition, Friedman and Waldfogel (1995) measure these costs using a case study of a Massachusetts Turnpike toll plaza and data from the New Jersey Turnpike Authority. While all of these studies address the cost issues that are important to administrators, they ignore the environmental costs.

In this study, we extend the Friedman and Waldfogel (1995) model by adding variables that measure the environmental impact of toll collection. We then use this model to calculate the total societal cost (TSC) of

toll collection on the Garden State Parkway (GSP) in New Jersey using Sisson's (1995) estimates for automobile emissions, and the New Jersey Highway Authority's traffic volume estimates. Our results clearly indicate that the environmental cost of toll collection is significant and should be included in any measure of total collection cost.

Methodology

The total cost of toll collection is equal to the sum of the administrative, compliance, and environmental costs. The Friedman and Waldfogel (1995) model measures the administrative and compliance costs. According to their model, administrative costs (AC) incurred during time t are equal to:

$$AC_t = w_T L_t + u_t K \qquad (1)$$

Where w_T equals the cost of operating a tollbooth per time period, L_t is the number of tollbooths staffed and operational during time period t, u_t includes the user cost of toll collection capital (including both borrowing and depreciation) per time period, and K equals the value of toll collection capital. Therefore, over any

extended period of time (for example, a year) administrative costs equal:

$$AC = w_T \sum_{t=0}^{T} L_t + K \sum_{t=0}^{T} u_t \qquad (2)$$

Compliance costs (CC) are measured as wQ, where w is the value of the road user's time and Q is the total amount of time the driver (assuming no passengers) is delayed in compliance:

$$Q = \sum_{t=0}^{T} \left(2fd + \frac{q_t}{L_t \alpha} \right) a_t \qquad (3)$$

where fd equals the fixed delay, q_t equals the number of vehicles in the queue at time t, L_t equals the number of lanes staffed at time t, α equals the number of vehicles that can be processed per lane per time period, or the throughput rate, and a_t is the number of vehicles arriving per time period. Therefore, according to this model, total collection costs (TC) equal:

$$TC = AC + CC \qquad (4)$$

However, as Sisson (1995) points out, the process of toll collection creates a significant amount of additional pollution as compared to transit at highway speeds. This is not accounted for in equation 4. To calculate

the pollution cost per pollutant x (PC_x), we use the following equation:

$$PC_x = (fp + (vp\ r_x))p_x \qquad (5)$$

where fp equals the fixed acceleration pollution of pollutant x per toll collection, vp equals the queuing pollution of pollutant x, r_x is the average rate of production of pollutant x per time period, and p_x is the cost of pollutant x to society on a per unit basis. Total pollution cost (PC) is equal to:

$$PC = \sum_{x=1}^{m} PC_x \qquad (6)$$

where m is the total number of pollutants being measured. We add this variable to the right-hand side of equation 4, that we call the total societal cost of toll collection (TSC):

$$TSC = AC + CC + PC \qquad (7)$$

Case Study: The Garden State Parkway

New Jersey's Garden State Parkway (GSP) is 173 miles long and has eleven major toll barriers and twenty ramp toll plazas. Based on data collected from the New Jersey Highway Authority we calculate the

total societal cost of toll collection on the GSP for the year 2000 using the model outlined above. Our goal is to demonstrate that when pollution costs are ignored, the total cost of toll collection is significantly understated.

Administrative Costs (AC)

The New Jersey Highway Authority estimates that administrative costs on the GSP (including the cost of capital and the labor costs of toll collectors and administrators) were $0.07 per toll collection in the year 2000. They also report 436,161,722 toll collections at the major toll barriers for the same year. Therefore, we estimate administrative costs to be $30,531,321 for the year 2000.

Compliance Costs (CC)

The Friedman and Waldfogel (1996) model was designed for use on a two stop toll road where the driver stops once to pick up ticket and then again to pay the toll. While this is consistent with many toll collection systems such as the NJ Turnpike and the Massachusetts Turnpike, on the Garden State Parkway, drivers stop repeatedly for the duration of the trip with a maximum distance of 24.76 miles and a minimum of 5.79 miles between major toll barriers. A driver following the whole route of the GSP would stop

at 11 barriers along the route. Therefore, we need to modify Friedman and Waldfogel's (1995) compliance cost function so that it calculates costs on a per stop basis: $CC_t = (fd+vd_t)w$ (8)
where CC_t equals the compliance cost at time t (per stop), fd equals the fixed delay, vd_t is the variable delay at time period t, and w equals the value of the road user's time. The Triborough Bridge and Tunnel Authority estimates that the theoretical maximum for the number of vehicles a tollbooth can process is 250 per hour. Based on this, we calculate the fixed delay as 7.2 seconds per car. With 436,161,722 toll stops occurring in the year 2000, at a delay of 7.2 seconds per stop, this totals 872,323 hours spent paying tolls. At an average wage rate of $20 per hour[1], this represents a total compliance cost (CC) of $17,446,469 for the year 2000.

Pollution Costs (PC)

We estimate the pollution costs related to toll collection on the GSP using Sisson's (1995) estimates of pollution production from decelerating an automobile to zero miles per hour and then reaccelerating to the same speed. Sisson (1995) examined three vehicle classes (pre-1979, 1980-1988, and 1989-1994) in his study and their corresponding production of Nitrous

Oxide, Hydrocarbons, and Carbon Monoxide. While

[1] The estimated wage rate is from the Bureau of Labor Statistic's 1998 estimate of the average income of New Jersey residents ($39,516). Dividing this number by a two thousand hour work year results in an average hourly wage of $19.75.

this was representative of the automobile population in 1995, our estimates of pollution production in 2000 are taken from the most recent period.[2] The fleet average output of pollutants for this cohort, per acceleration, net of what would be created by a quarter mile transit at 65 m.p.h., are given in row two of Table 1. Based on these estimates, the cost per kg of pollutant, and the total number of toll collections on the GSP during the year 2000, we estimate the total cost of pollution from toll collection at $12,702,011. With toll collection revenue on the GSP reported to be $152,656,602 for the year 2000, pollution costs represent 8.32% of revenue collected[3].

[2] Emission standards for Hydrocarbons, Carbon Monoxide, and Nitrous Oxide have remained constant for automobiles and light trucks since 1994. The Sisson (1995) data is attached as Appendix 1.

[3] Details of our pollution calculations are included in Appendix 2.

Table 1: Calculation of the Total Pollution Cost Resulting from Toll Collection on the Garden State Parkway (2000)

	Nitrous Oxide	Hydrocarbons	Carbon Monoxide
Grams emitted per 0-65 acceleration net of continuous 65 m.p.h. transit	0.63	0.85	32.25
Number of accelerations on the GSP	436,161,722	436,161,722	436,161,722
Total grams emitted on the GSP	272,601,077	370,737,464	14,066,215,548
Pollution cost per kg (Sisson 1995)	$11.81	$4.71	$0.55
Total pollution cost (PC) on the GSP	$3,219,419	$1,746,173	$7,736,419

This estimate is on the conservative side because we did not estimate the queuing costs for the GSP. Given that the commuter on the GSP currently has three payment choices – manual, exact change and *low-speed* EZ-Pass, and that traffic volumes vary greatly over the course of the day, estimating the costs related to queuing are very complex and beyond the scope of this study. Nevertheless, including queuing would only increase pollution costs as a percent of revenue collected, further bolstering our argument in favor of including pollution costs in the total cost equation.

Total Societal Cost (TSC)

From equation 5, total societal cost represents the sum of administrative, compliance and pollution costs. In the case of the GSP in the year 2000, we estimate total societal cost of toll collection to be $54,566,340 or 39.75% of revenue collected (see Table 2), and pollution costs represent 20.93% of TSC, only slightly less than compliance costs.

Table 2: Component Costs as a Percent of Total Collections

Component	Revenue/Cost	Percent of Revenue	Percent of TSC
Revenue Collected	$152,656,602	100%	----
Costs:			
Administrative Costs (AC)	$30,531,321	20.00%	50.32%
Compliance Costs (CC)	$17,446,469	11.43%	28.75%
Pollution Costs (PC)	$12,702,011	8.32%	20.93%
Total Societal Cost (TSC)	$60,679,800	39.75%	100%
Net Revenue	$91,976,802	60.25%	----

Conclusion

Economists should not ignore pollution costs when estimating the total cost of toll collection. By examining the pollution costs on the Garden State Parkway we have shown that, even without measuring the environmental impact of queuing, pollution costs constitute 20.93% of the total societal cost of toll collection, or 8.32% of revenue collected.

The model we develop in this paper will assist public policy makers in making optimal decisions regarding toll collection procedures. For example, the cost estimates in this paper are based on a one hundred percent manual toll collection process.[4] If high speed, automated toll collection procedures were implemented, or if tolls were partially or completely eliminated, we would expect pollution costs to decline significantly. These types of policy issues can only be properly analyzed if all costs/benefits are accounted for, including those regarding the environment.

[4] The GSP is currently only using a low speed collection method, which our research indicates results in almost the same amount of pollution as manual toll collection. See our kinetic energy calculations attached as Appendix 3 for further details on the loss of energy caused by the slowing of vehicles in toll plaza.

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Appendix 1

Pollution Production from Automobile Operation

Average Driving Cycle (FTP Cycle)

Emission Rates in Grams Per Mile (Sisson 1995)

	Nitrous Oxide	Hydrocarbons	Carbon Monoxide
New Cars (1989-1990)	0.50	0.40	3.00
Older Cars (1969-1979)	4.80	10.70	62.40

Grams Emitted Per 0-65 Acceleration by Car Age (Sisson 1995)

Car Age	Nitrous Oxide	Hydrocarbons	Carbon Monoxide
1989-1994	0.75	0.95	33.00
1980-1988	2.36	7.07	196.00
1979 and Older	7.20	25.41	686.00

Fleet Average for One 0-65 MPH Acceleration (Sisson 1995)

	Nitrous Oxide	Hydrocarbons	Carbon Monoxide
"Fleet Weighted Average"	2.21	6.50	181.00

Appendix 2

Impact of Full Stop Manual Toll Collection on Grams of Pollution Output

Delta for One Full Stop at Toll Plaza Versus High Speed Automated Toll Collection

Event	Grams of Nitrous Oxide	Grams of Hydrocarbons	Grams of Carbon Monoxide
1/4 of Mile Transit (#1)	0.13	0.10	0.75
0-65 Acceleration (#2)	0.75	0.95	33.00
Delta for Stop at Plaza (2-1)	0.63	0.85	32.25

Number of Transits - Major GSP Toll Plazas in 2000 **436,161,722.43**

Total Grams Annual Pollution Produced	Nitrous Oxide	Hydrocarbons	Carbon Monoxide
	272,601,077	370,737,464	14,066,215,548
Tons	299.86	407.81	15,472.84

Pollution Costs (Sisson 1995) Per Kilogram	Nitrous Oxide	Hydrocarbons	Carbon Monoxide
Price per Kilogram	$ 11.81	$ 4.71	$ 0.55

Total Annual Pollution Costs - 11 Major Barriers on Garden State Parkway	$ 3,219,419	$ 1,746,173	$ 7,736,419	
	Total Pollution Costs	$ 12,702,011	For Year 2000	

Appendix 3
Energy Conservation - Estimated
Comparison of Alternative Toll Collection Speeds

Automobile Weight (lbs)	Automobile MPH Speed	Automobile Mass Kilograms	Automobile Speed Meters Per Second	Kinetic Energy $KE=1/2\ MV^2$ joules	55 MPH Energy Percentage
3,000	65	1,360.8	29.06	574,491.7	139.67%
3,000	60	1,360.8	26.82	489,507.8	119.01%
3,000	55	1,360.8	24.59	411,322.5	100.00%
3,000	50	1,360.8	22.35	339,935.9	82.64%
3,000	45	1,360.8	20.12	275,348.1	66.94%
3,000	40	1,360.8	17.88	217,559.0	52.89%
3,000	35	1,360.8	15.65	166,568.6	40.50%
3,000	30	1,360.8	13.41	122,376.9	29.75%
3,000	25	1,360.8	11.18	84,984.0	20.66%
3,000	20	1,360.8	8.94	54,389.8	13.22%
3,000	15	1,360.8	6.71	30,594.2	7.44%
3,000	10	1,360.8	4.47	13,597.4	3.31%
3,000	5	1,360.8	2.24	3,399.4	0.83%
3,000	0	1,360.8	-	-	0.00%